SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 874

FRANK ANDREWS,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Courts Below

No opinion in the herein cause was rendered by any of the lower courts.

II

Jurisdiction

The jurisdiction of this Court to entertain a petition for a writ of certiorari and the allowance thereof is provided for in Judicial Code, Section 237, as amended by the Act of February 13, 1925, 43 Statutes 937, particularly Section 237 (a) (b).

The date of the judgment and decree to be reviewed is October 31st, 1945, together with the overruling of an application for rehearing by the Supreme Court of Ohio on November 21st, 1945.

The jurisdiction of this Court is sustained by Rule 38, Section 5 (a) and (b), see also *Matthews* v. *Huwe,* 269 U. S. 262; *Cuyahoga River Co.* v. *Northern Realty Co.,* 244 U. S. 300; *Williams* v. *Heard,* 140 U. S. 529; *Rector* v. *City Bank Co.,* 200 U. S. 405; and *Eau Claire National Bank* v. *Jackman,* 204 U. S. 522.

III

Statement of the Case

The petition for a Writ of Certiorari shows that Frank Andrews was indicted and convicted under General Code of Ohio Section 13064-1 of the offense of "promoting and carrying on a scheme of chance."

The State of Ohio at the same time enacted two statutes covering the subject of "promoting a scheme of chance" and under one statute made it an offense if carried on for "one's own profit" and under the other statute made it an offense whether or not for one's own profit. The legislative purpose was to permit the carrying on of a scheme of chance and gambling by charitable and religious organizations, or by individuals for charity's sake. So as to properly distinguish (or as we call it discriminate) the legislature adopted this scheme by means of two statutes. In the present case the accused was neither charged with nor was any effort made to show that he promoted a scheme of chance for his own profit. He was convicted and sentenced the maximum penalty provided by the harsher of the two statutes.

IV

Specification of Errors

The trial court erred in overruling the motion to quash the indictment and the demurrer to the indictment and the accused's motion to dismiss him. The Court of Appeals and the Supreme Court of Ohio committed error in affirming the action of the trial court.

V

Argument

The facts as outlined above present this simple proposition of law.

MAY THE STATE OF OHIO ENACT TWO STATUTES OF THE CODE, UNDER ONE OF WHICH IT EFFECTUATES A POLICY OF CHARITABLE GAMBLING, AND UNDER THE OTHER IT PENALIZES GAMBLING OTHER THAN CHARITABLE? UNDER SUCH LEGISLATION CAN THE PROSECUTING ATTORNEY HAVE THE POWER OF SELECTING UNDER WHICH SECTION OF THE CODE TO PROCEED, AND OBTAIN A CONVICTION AGAINST AN ACCUSED?

The petition under the heading "Reasons Relied on For the Allowance of Writ" sets forth the history and language of the two Sections of the Code. We direct the Honorable Court's attention first to the decisions in the State of Ohio and then to the decision by this Court covering the law applicable to this situation.

Of course, in Ohio we only have statutory offenses. *State* v. *Rose*, 89 Ohio State, 383 at page 386:

> "Since we have no common-law crime in the State of Ohio, we must look to the Statutes for the declaration and definition of a crime."

The making of an act a crime must be of uniform application throughout the State and in the same manner uniform in its application, to all persons. *State* v. *O'Mara,* 105 O. S. 94 Syl. 1:

> "The power to define and classify and prescribe punishment for felonies committed within the State is lodged in the general assembly of the State, and when so defined, classified and prescribed, such laws must have uniform operation throughout the State."

In the present case no less stringent restrictions can be placed on one class of people under Section 13064 of the General Code and more stringent provisions as against another class of people under Section 13064-1. Both sections, if they define the same offense, must apply to all people equally. If on the other hand one Statute permits what the other Statute prohibits, then no prosecution can be had under the prohibitory Statute. *Toledo Disposal Company* v. *Ohio,* 89 O. S. 230:

> "No criminal prosecution can be sustained in Ohio except for an act done in violation of a statute or ordinance legally passed; and the courts will not construe that to be a crime punishable under one statute which was done under authority especially granted by another statute."

Of course, a criminal statute must be construed strictly and against the State. See *Rogers* v. *State,* 87 O. S. page 312:

> "It is elementary, in construing statutes defining crimes and criminal procedure, that they must be strictly construed, reasonably, of course, but still strictly. The criminal statutes of Ohio having specially excluded certain foregoing sections from the requirement of filing an information by the Prosecuting Attorney, it must be presumed that as to all other

sections upon which criminal prosecutions in the Probate Court are founded, they still must follow the general rule."

We direct the court's attention to the rule laid down in *State* v. *Meyer,* 56 O. S. 340 and which is approved in *State* v. *Krauss,* 114 O. S. at page 348:

> "A statute defining a crime or offense cannot be extended, by construction, to persons or things not within its descriptive terms, though they appear to be within the reason and spirit of the statute."

In the *Krauss* case the court concluded *on page 350* as follows:

> "In the case at bar the intent of the defendant to keep the machine as a gaming device for gain is of the essence of the offense, which might be shown under certain conditions by redeeming the checks won by the player, thus bringing something of value to the player for nothing which might appeal to the gambling instinct.
>
> "In the light of the meager record presented in this case, we are unable to find that the State showed beyond the existence of a reasonable doubt the essential elements going to make up the offense charged, and we are, therefore, led to the same conclusion reached by the Common Pleas Court and the Court of Appeals, to-wit, that the record does not show sufficient to sustain the judgment of the Justice of the Peace."

From a consideration of the above authorities it must be evident that the Legislation under which the defendant in this case was prosecuted was improper. We further contend that if the two Sections of the Code, passed simultaneously, permit the operation of a scheme of chance "without profit" and thus license a certain act while at the same time prohibit the same act in the next Statute, such

legislation definitely is unequal in its application, and, therefore, is unconstitutional. No matter what may have been in the mind of the Legislature, whether it had a desire to permit "charitable" gambling and prohibit other gambling, of if it desired to effectuate a policy as shown in the argument of the Prosecuting Attorney wherein he said:

> "I don't think a penny-ante game in somebody's cellar is our business. Probably I should not say that as the Prosecutor of this County."

Notwithstanding such legislative policies, it clashes directly with the provisions of the Constitution of our State which provides under Article XV, Section 6:

> "Lotteries and the sale of lottery tickets for any purpose whatsoever, shall forever be prohibited in this State."

We cannot, therefore, say that Section 13064 undertook to license or permit all gambling if engaged in not "for his own profit," while Section 13064 prohibited all gambling whether engaged in for profit or otherwise. Without the passage of either one of the two Sections no offense could be committed. Can it then be said that the defendant in this case is to serve a term in the Penitentiary because the Prosecutor noted on the indictment that it was a violation of Section 13064-1, but could not be held or convicted of any crime (there being no proof that he conducted game for his own profit); if the prosecutor had noted on the indictment that it was a violation of Section 13064? Are the liberties of citizens to hang upon such a thin thread as the whim and fancy of a Prosecutor?

In line with the decisions of this Court, pointing out that a Legislative body cannot permit what the constitution prohibits, and perhaps to put it more clearly, cannot give

an exemption from crime to one group while impose a penalty on the other, we direct the court's attention to the case of *Seattle* v. *Chin Let,* 19 Wash. 38, wherein the court held that the exception of charities from lottery statute is invalid.

On the proposition that a statute must have equal application we direct your attention to the following authorities:

The Supreme Court of the United States in the case of *Frost* v. *Corporation Commission,* 278 U. S. 515, Mr. Justice Sutherland delivered the opinion of the court and said in part:

> "Mere difference is not enough; the attempted classification must always rest on some difference which bears reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, badly creates one rule for a natural person and a different and contrary rule for an artificial person notwithstanding the fact that both are doing the same business with the general public and to the same end, namely, that of reaping profits, it produces a classification which subjects one to the burden of showing a public necessity for his business from which it relieves the other and is essentially arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation."

And in *Barbier* v. *Connolly,* 113 U. S. 923, Mr. Justice Field said in part:

> "That no greater burdens should be laid upon one than are laid upon others in the same calling and conditions, and that in the administration of criminal justice no different or higher punishment should be

imposed upon one than such as is prescribed to all for like offenses" and

"Class legislation, discriminating against some and favoring others, is prohibited."

In the case of *Connolly, et al.* v. *Union Sewer Piper Co.* reported in 184 U. S. 679, it was held:

"Classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis * * * But arbitrary selection can never be justified by calling it classification."

These principles were recognized and applied in *Cotting* v. *Kansas City Stock Yards,* 183 U. S. 92, where it was unanimously agreed;

"That a statute of Kansas regulating the charges of a particular stock yard company in the State, but which exempted certain stock yards from its operation was repugnant to the 14th Amendment in that it denied to that company the equal protection of the laws in prescribing regulations for the conduct of trade and it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class, engaged in the same domestic trade, to do the same things with impunity."

And then in *Tigner* v. *Texas,* 310 U. S. 141, it was held:

"The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."

In the case of *Skinner* v. *Oklahoma,* 316 U. S. 535, it was held:

"When the law lays an unequal hand on those who have committed intrinsically the same quality of offense

> and sterilizes one and not the other, it has made an invidious discrimination as if it had selected a particular race or nationality for oppressive treatment."

In the case of *State* v. *Gardner*, 58 O. S. 599, it was held:

> "A law which requires every plumber to undergo examination and obtain a license, but permits all members of a firm to pursue the business where one only has procured such license, does not operate equally upon all of a class, and is invalid."

And in *State ex rel. Hostetter* v. *Hunt*, 132 O. S. 568, the Court held:

> "A statute which confers special benefits upon delinquent taxpayers not equally available to non-delinquent taxpayers violates Article I Section 2 of the Constitution of Ohio, and is therefore void and of no effect."

The court in *Xenia* v. *Schmidt*, 101 O. S. 437, said:

> "The classification must not be arbitrary, artificial, or evasive, but there must be a real and substantial distinction in the nature or classes upon which the law operates."

Summary of the Argument

The decision of the courts is contrary to and in conflict with prior Federal and State court decisions as is evident from the authorities cited in the brief. The accused finds himself in the position facing a term in the Penitentiary and a fine by reason of his conviction under a statute which makes a certain act a crime, while at the same time another statute of the State permits the doing of the same act. Under such circumstances this Honorable Court should take cognizance of this case, order a Writ of Certiorari, review it, and announce the principles of law which should be properly applied thereto.

Conclusion

It is respectfully submitted that this case is one calling for the intervention by this Court of its supervisory power in order that

(a) the decision by the State Court sustaining a State Statute which is in conflict with the Constitution of the State of Ohio and the Constitution of the United States of America and

(b) An important question of general law having been decided in a way probably erroneously and in conflict with the weight of authorities and

(c) The State Court having decided the question in a way probably in conflict with prior decision of this Court; it may be properly reviewed and to such an end a Writ should be granted and this Court should review the decision of the Supreme Court of Ohio and finally reverse it.

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